

FILED BY CLERK

AUG 22 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0259-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JAIME PEREZ MUNOZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2008118612001DT

Honorable Susan M. Brnovich, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Lisa Marie Martin

Phoenix
Attorneys for Respondent

Jaime Perez Munoz

Florence
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Jaime Munoz seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See*

State v. Swoopes, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Munoz has not met his burden of establishing such abuse here.

¶2 Munoz was convicted after a jury trial of kidnapping, sexual assault, and two counts of attempted sexual assault. The trial court sentenced him to concurrent, presumptive prison terms, the longest of which was seven years, and placed him on a term of lifetime probation. His convictions and sentences were affirmed on appeal. *State v. Munoz*, No. 1 CA-CR 08-1033 (memorandum decision filed Apr. 29, 2010). Munoz then filed a notice of post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but had been “unable to find any claims for relief to raise in post-conviction relief proceedings.”

¶3 In his subsequent pro se petition, Munoz claimed the prosecutor had committed misconduct by “submitting a judicially inadequate indictment,” “telling the jury that the defendant was guilty,” and “informing the court and jury” that the victim was unavailable to testify because she was in Mexico when, in fact, she was in Arizona, thereby violating his right to confrontation. Munoz also claimed his trial counsel was ineffective because he “was not the attorney of record,” and did not challenge the indictment, interview various prospective witnesses before trial, “file any pretrial motions,” “attempt to suppress any evidence,” or challenge the state’s assertion the victim was unavailable to testify. Munoz further argued the trial court “abuse[d] it[]s discretion” by proceeding despite the purportedly flawed indictment, and erred in failing to instruct the jury on reasonable doubt. Finally, Munoz argued his appellate counsel was ineffective for failing to raise all of the preceding claims.

¶4 The trial court summarily denied relief, finding precluded all of Munoz’s claims except those of ineffective assistance of counsel. As to those claims, the court determined Munoz had not demonstrated any challenge to the indictment or other pretrial motions would have been successful, nor that his counsel did not, in fact, interview the listed witnesses, much less that those witnesses would have helped his case. The court additionally found that Munoz had not shown appellate counsel’s decision to forgo various claims was unreasonable.

¶5 On review, Munoz largely incorporates by reference the arguments made in his petition below. But that procedure is not permitted by our rules, and we therefore do not consider those arguments. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv). Munoz additionally asserts the trial court erred in finding his claims precluded because they are of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver. *See Swoopes*, 216 Ariz. 390, ¶ 21, 166 P.3d at 951; *see also* Ariz. R. Crim. P. 32.2(a)(3) (claims precluded if waived on appeal). But, beyond this blanket assertion, Munoz does not identify what rights were violated, nor does he cite any authority suggesting those rights require a voluntary, knowing, and intelligent waiver.¹ Accordingly, we do not

¹Munoz asserts in his reply that his claim that the indictment was “duplicious” and lacking sufficient detail is jurisdictional and thus may be raised at any time. *See* Ariz. R. Crim. P. 16.1(b) (“Lack of jurisdiction may be raised at any time.”). Errors in an indictment are not jurisdictional and are subject to waiver and, therefore, to preclusion. *See State v. Maldonado*, 223 Ariz. 309, ¶ 13, 223 P.3d 653, 655 (2010); *see also* Ariz. R. Crim. P. 32.2(a)(3) (waived claims precluded). We also find unavailing Munoz’s argument that the state failed to meet its burden of demonstrating his claims were precluded. Although Munoz is correct that Rule 32.2(c) requires the state to “plead and prove any ground of preclusion by a preponderance of the evidence,” the rule also provides that, despite that requirement, “any court on review of the record may determine

address this argument further. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review must comply with rule governing form of appellate briefs and contain “reasons why the petition should be granted” and either an appendix or “specific references to the record”); Ariz. R. Crim. P. 31.13(c)(1)(vi) (briefs must contain argument and supporting authority); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review). Finally, Munoz has identified no error in the trial court’s determination that his various claims of ineffective assistance of trial and appellate counsel were not colorable.

¶6 For the reasons stated, although review is granted, relief is denied.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

and hold that an issue is precluded.” As we have noted, Munoz has not demonstrated the trial court erred in concluding his claims were precluded.